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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1948

MOTION NO. 466

COKE R. STEVENSON,
Movant,

VS.

LYNDON B. JOHNSON ET AL,
Respondents

MOTION TO VACATE STAY ORDER AND DISMISS THE PROCEEDINGS,

and

MEMORANDUM OF AUTHORITIES

In the Supreme Court of the United States

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MOTION NO._____

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LYNDON B. JOHNSON ET AL,
Respondents

MOTION TO VACATE STAY ORDER AND DISMISS THE PROCEEDINGS,

To the Supreme Court of the United States:

Coke R. Stevenson, moving for an order of the Court vacating the stay order made by Associate Justice Black on September 28, 1948, on the motion of Lyndon B. Johnson, V. F. Striegler, Frank Shelley and C. H. Stevenson, the latter three as the Election Board of Blanco County, Texas, and as representatives of other such boards, petitioners, (against whom complaint is made) versus Coke R. Stevenson, respondent, shows:

I.

On September 28, 1948, Associate Justice Black, as an Associate Justice of the Supreme Court of the United States, made an order on the motion of Lyndon B. Johnson and others, petitioners, (herein for convenience referred to as petitioners) against Coke R. Stevenson, respondent (herein for convenience referred to as respondent), staying a temporary injunction issued by the United States District Court for the Northern District of Texas, Fort Worth Division, on September 23, 1948, in an action entitled *Coke R. Stevenson vs. Lyndon B. Johnson et al*, Civil No. 1640, in substance, restraining, pending trial of said action on its merits, the Secretary of State of the State of Texas from certifying to the election officials of the State of Texas, and the election boards of the several counties of Texas from printing on the official election ballot for use in the general election to be held in Texas on November 2, 1948, the name of Lyndon B. Johnson as the nominee of the Democratic Party for the office of United States Senator from Texas.

An appeal has been taken to the United States Court of Appeals for the Fifth Circuit from the order of the District Court granting said temporary injunction, the record has been filed in said United States Court of Appeals, and the appeal has been set by agreement of the parties for submission and oral argument before the United States Court of Appeals in Atlanta, Georgia, on Monday, October 4, 1948.

II.

The stay order so made should be vacated and the motion of petitioners dismissed for the following reasons:

(1) The motion of petitioners on which said stay order was made, recites that it is for "a stay of a temporary injunction" and "for a stay of other proceedings in the said District Court," and therein petitioners pray for an order "staying the temporary injunction issued by the Honorable T. Whitfield Davidson, as Judge of the United States District Court for the Northern District of Texas, and staying all further proceedings in that court in this case until further order of the Supreme Court"; and, properly construed, said motion is a petition to an Associate Justice of this Court for a writ of prohibition. So construed, the motion does not warrant the order made and the order was erroneously and improvidently made, because

(a) The motion of petitioners was not one upon which a Justice of this Court had jurisdiction or power to act, because under the practice in this Court, as respondent understands, the filing of a motion or petition to prohibit further proceedings in a lower court is not a matter of right, and leave to file is granted only by action of the Court

upon motion, with notice to the opposite party to show cause before the Court why writ of prohibition should not issue; writ of prohibition restraining further proceedings in a lower Court is a matter for the discretion of this Court; such a writ will be granted only to protect or preserve the jurisdiction of this Court; it cannot be granted by a Justice of the Court, but only by the Court.

(b) In such a proceeding the Judge or Judges of the lower Court are indispensable parties, but neither of the Judges of the Court of Appeals in which the appeal is pending nor the Judge of the District Court is made a party to petitioners' motion.

(c) The complaint and the amendment thereto, filed in the District Court, copies of which are attached to petitioners' motion and identified as Exhibits A and B (to which reference is made for a full statement of the allegations thereof and of the nature of the action) state a claim within the jurisdiction of District Courts of the United States.

(2) If petitioners' motion is treated as only a motion to stay the temporary injunction granted by the District Court after hearing, the stay order was erroneously and improvidently made, because

(a) The jurisdiction or power of a Justice of this Court to order a stay of a judgment or decree of a lower Court is limited to those cases and instances in which such action is necessary to preserve or protect the jurisdiction of this Court, and specifically to cases in which the "final judgment or decree * * * is subject to review by the Supreme Court on writ of certiorari" (the case pending in the District Court being such a case), and the jurisdiction or power of a Justice of this Court is limited to ordering a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." The motion filed by petitioners does not show that petition for certiorari will be filed, though counsel for petitioners stated on hearing that such a petition would be filed.

(b) Appeal is pending in the United States Court of Appeals for the Fifth Circuit and is set for submission and argument on Monday, October 4, 1948.

(c) The District Judge and Honorable Joseph C. Hutcheson, Circuit Judge, have each refused to stay the injunction order,—the latter stating that as a Judge of the United States Court of Appeals he was without power to grant a stay and that his refusal was without prejudice to the right of petitioners to

present to the Circuit Court a motion to stay.

(d) It is not shown that a motion to stay has been filed in the United States Court of Appeals having jurisdiction of the appeal or that a stay order has been denied by said Court.

(e) This is not a case in which certiorari before judgment will reasonably or probably be granted.

(f) It is not made to appear by petitioners' motion (1) that the District Court did not have jurisdiction of the action there pending, (2) that the District Court did not have power or jurisdiction to grant the temporary injunction, (3) that the temporary injunction was not necessary to preserve the status quo of the subject-matter of the action pending in the District Court, (4) that there was a clear abuse of discretion in granting the temporary injunction, (5) that a decided balancing of conveniences requires a stay of the temporary injunction, or (6) that the stay will not destroy the status quo and effectively deprive respondent of the rights claimed by him under the Constitution and laws of the United States in his pleadings in the District Court.

(g) It appears from the face of petitioners' motion in this Court that the temporary injunction was necessary to pre-

serve the status quo of the subject-matter of the action, and that to stay the force of the temporary injunction is to destroy the rights claimed by respondent under the Constitution and laws of the United States in his pleadings in the action pending in the District Court.

Wherefore, respondent prays that the order made on September 28, 1948, staying the temporary injunction granted by the District Court be vacated and petitioners' motion dismissed; and for proper order restoring the status existing at the time the stay order was made.

Respectfully submitted,

C. C. RENFRO

JOSH H. GROCE

HENRY H. BROOKS

DAN MOODY

Attorneys for Movant
(referred to herein as Respondent)

In the Supreme Court of the United States

OCTOBER TERM, 1948

MOTION NO.....

COKE R. STEVENSON,
Movant

VS.

LYNDON B. JOHNSON ET AL,
Respondents

MEMORANDUM OF AUTHORITIES

I.

To the Supreme Court of the United States:

Coke R. Stevenson and Lyndon B. Johnson were candidates in the Democratic primary election held in Texas on August 28, 1948, for the party nomination for United States Senator from Texas. The returns as certified by the chairmen of the several County Democratic Executive Committees and canvassed by the State Democratic Executive Committee showed that out of nearly one million votes cast in the primary, Lyndon B. Johnson received a majority over Coke R. Stevenson of eighty-seven (87) votes.

The State Democratic Committee made its canvass on September 13, 1948, and on September 14, 1948, certified the results thereof to the State Democratic Convention. The statutes of Texas provide for this procedure, and that the report of the State Executive Committee to the State Convention may be approved or rejected by the Convention. Articles 3127 and 3137, *Vernon's Texas Civil Statutes.*) The State Executive Committee, in canvassing the returns from the counties, acts as a canvassing board and does not have power to conduct an election contest. (*Ferguson vs. Huggins*, 122 Tex. 95.) The State Democratic Convention approved the report of the State Executive Committee. The statutes further provide that the chairman and secretary of the State Convention shall certify to the Secretary of State the names of the party nominees for the various state offices to which persons are to be elected at the general election to be held on the first Tuesday in November. (Article 3138, *Vernon's Texas Civil Statutes.*) Such a certificate was signed by the chairman and secretary of the State Democratic Convention on September 14, 1948, showing that Lyndon B. Johnson was the party nominee for United States Senator from Texas. The certificate was signed prior to the granting of the restraining order hereafter mentioned, but it was not delivered to the Secretary of State until after the restraining order was granted.

The statutes provide that the Secretary of State shall thirty days before the election prescribe and furnish to certain county officers forms of blanks to be used in the general election and certify the names

of the various candidates for state offices whose names are to appear on the general election ballot. These names are to be posted by the several County Clerks for ten days before he orders the ballots printed, and absentee voting is permitted to begin twenty days before the day on which the election is to be held. (Articles 2925, 2956 and 3132, *Vernon's Texas Civil Statutes.*)

On September 15, 1948, Honorable T. Whitfield Davidson, Judge of the District Court of the United States for the Northern District of Texas, granted a temporary restraining order on respondent's complaint. In effect, the order was to restrain, pending hearing, the Chairman and Secretary of the State Democratic Convention from certifying the name of Lyndon B. Johnson to the Secretary of State as the nominee of the Democratic party for United States Senator from Texas. The certificate had been signed by the Chairman and Secretary before the restraining order was granted, but it was not delivered to the Secretary of State until after the order was made. Thereafter respondent amended his complaint to make the Secretary of State and the members of the Election Board of Tarrant County, Texas, the latter as representatives of a class, parties defendant. On the amendment the District Judge extended the restraining order, in effect, to restrain certifying and printing of Lyndon B. Johnson's name on the official election ballot pending hearing, and the order was made returnable for a hearing before the District Court on September 21, 1948.

Upon hearing before the District Court, a temporary injunction was granted, in effect, restraining

the Secretary of State from certifying petitioner Johnson's name and the election boards from printing his name on the ballot pending further hearing.

An appeal has been prosecuted by petitioners from this order; and the record has been filed in the United States Court of Appeals, and the same set for submission on October 4, 1948.

Respondent's action in the District Court was brought under Section 43, Title 8, *United States Code Annotated.* Jurisdiction was in the District Court under Section 1331 and paragraph (3) of Section 1343 of Title 28, *United States Code*, 1948.

Respondent alleged, in substance, that he was a candidate for nomination by the Democratic party at the general party primary held on August 28, 1948; that fraudulent election returns were certified by the Chairman of the County Democratic Executive Committee of Jim Wells County, Texas, and by the County Chairman of Zapata County, Texas; that by said fraudulent returns more votes were fraudulently and falsely reported for petitioner Johnson than the eighty-seven (87) majority accorded to petitioner Johnson in the canvass by the State Democratic Executive Committee; that nomination by the Democratic party in Texas is tantamount to election; and that the laws of Texas as construed by the Supreme Court of Texas do not afford a means of contesting a statewide primary election. (*Sterling vs. Ferguson*, 122 Tex. 122.) By trial amendment respondent alleged that the returns from Duval County, Texas, to the State Democratic Executive Committee showing a vote in Duval County of 4,622 for petitioner Johnson to 40 for respondent were fraudulent on their face.

Prior to the time that the District Judge signed the temporary injunction order three voters were allowed to intervene. They adopted respondent's complaint and the amendment thereto, and alleged that they had voted for respondent in the Texas primary election held on July 28, 1948, and that they had been deprived of their rights as voters in that their votes had been diluted and canceled by fraudulent returns as alleged in the complaint and amendment.

Respondent prayed for injunction, for cancellation of the certificate of the Chairman and Secretary of the State Democratic Convention and for declaration by the Court that he was entitled to the nomination.

It was respondent's position on the hearing for temporary injunction that the Constitution and laws of the United States secure to him, as a candidate for the nomination and as a voter, the right to an honest count of the votes cast and honest returns reporting the results of the election; that the fraudulent returns, if given effect, would have the result of depriving him of rights secured to him by the Constitution and laws of the United States and that under Section 43 of Title 8 of the *United States Code Annotated*, he was entitled to redress by actions at law, "suit in equity or other proper proceeding for redress" in a United States District Court.

II.

Petitioners' motion, properly construed, is a petition for prohibition, and the stay order was erroneously and improvidently granted.

An original proceeding in this Court or before a Justice thereof declared to be "for a stay of a tem-

porary injunction issued by" a United States District Court, and "for a stay of other proceedings in the said District Court," with a prayer that "an order be issued staying the temporary injunction" and "staying all further proceedings in that Court until further order of the Supreme Court," as is true of petitioners' pleading, is essentially a petition for prohibition.

Title 28, Section 1651, United States Code, 1948, provides:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in the aid of their respective jurisdictions agreeable to the usages and principles of law.
>
> "(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Under this statute it is only the court, and not a justice or judge thereof, that could grant the relief prayed for in petitioners' motion.

A writ of prohibition will ordinarily issue only in cases of manifest or extreme necessity and in matters of special emergency. Generally three things must concur to justify the issuance of the writ against a court: (1) that the court is exercising judicial or quasi-judicial power; (2) that the exercise of such power is unauthorized by law; (3) that it will result in injury for which there is no other adequate remedy. Where there is jurisdiction in a lower court of a proceeding pending there, a writ of prohibition ordinarily will not issue. (*Ex parte*

Bakelite Corporation, 279 U. S. 438; *Ex parte Southwestern Surety Ins. Co.*, 247 U. S. 19; 42 *Am. Jur.* 141-143; 50 *C. J.* 662-663.)

Ordinarily where a writ of prohibition is sought to prohibit the prosecution of litigation in a subordinate court, the judge of the court is a necessary party. (50 C. J. 699.)

The complaint and amended complaint attached to petitioners' motion state a case within the jurisdiction of the District Court. (Title 8, Section 43, United States Code Annotated; Title 28, United States Code, 1948, Sections 1331 and 1343(3); *United States vs. Classic*, 313 U. S. 299; *United States vs. Saylor*, 322 U. S. 385; *Bell vs. Hood*, 327 U. S. 678; *Cohens vs. Virginia*, 6 Wheat. 264, 379; *Osborn vs. Bank of United States*, 9 Wheat. 738, 882.) The correct decision of respondents' action in the District Court depends upon a construction of the Constitution and statutes of the United States.

III.

If petitioners' motion is treated as only a motion to stay the temporary injunction granted by the District Court after hearing, the stay order was erroneously and improvidently made.

The jurisdiction or power of a justice of the Supreme Court to stay a judgment or decree of a lower court is limited to those cases and instances in which such action is necessary to preserve or protect the jurisdiction of this Court, and specifically to cases in which the "final judgment or decree * * * is

subject to review by the Supreme Court on writ of certiorari," and then only "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." (Title 28, United States Code, Section 2101(e). The statute limits the granting of the stay to "a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." Supersedeas or stay proceedings in cases taken to the Supreme Court by appeal from Courts of Appeals or by direct appeal from a District Court or a three-judge court are governed by Rule 62 of The Federal Rules of Civil Procedure. (Reviser's notes to the Act of Congress approved June 25, 1948, effective September 1, 1948, Title 28, United States Code.)

The granting of a stay order is discretionary and ordinarily it will not be granted except a strong showing be made of a need for the relief and the propriety of it and that the case is one in which probable grounds exist for the issuance of a writ of certiorari by the Supreme Court. (*Magnum Import Company vs. Coty*, 262 U. S. 159, 163.)

An application for a stay should ordinarily be first presented to the judge of the court whose judgment or decree is to be reviewed, (*Magnum Import Company vs. Coty*, 262 U. S. 159, 163); and if refused the application may then be presented to a justice of the Supreme Court (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, 833-834). In this instance the appeal from the order of the trial court has been lodged in the Court of Appeals but no application for a stay has been presented to that court. Generally an appellate

court will not, pending an appeal, suspend an injunction prior to a hearing on the merits after the trial court has refused to grant a stay. (*Magnum Import Company vs. Coty*, 262 U. S. 159; *American Strawboard Company vs. Indianapolis Water Company* (7th Cir.), 81 Fed. 423.)

This case is not a case in which a petition for certiorari will reasonably or probably be granted before judgment of the Court of Appeals because (1) writs of certiorari are seldom granted in such cases and the power is one "not ordinarily to be exercised" (*The Three Friends*, 166 U. S. 1), and it has been only under unusual circumstances that the power has been exercised (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, 204-206, 620-622); and (2) on the appeal to the Court of Appeals from the order granting the interlocutory injunction, the reviewable questions as appear from petitioner's motion would be (a) the jurisdiction of the District Court and (b) whether the granting of the temporary injunction was an abuse of discretion; and (3) the appeal pending in the Court of Appeals will, it appears, be argued and under submission before any petition for certiorari is filed, and ordinarily writ of certiorari would not be granted under such circumstances. (*Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, 621.)

It is apparent from the foregoing statement of the Texas election procedure and the statutes cited that the temporary injunction granted by the trial Court was necessary to preserve the status quo and that the stay order will have the effect to destroy the

status quo and, in effect, dispose of the case upon its merits and deprive respondent of redress in equity as secured to him by the provisions of Section 43, Title 8, United States Code Annotated, against the deprivation of rights secured to him by the Constitution and laws of the United States.

Upon vacating the stay order, the Court has power to take such action as is necessary to restore the status existing at the time the stay order was made. (*Lawrence vs. St. Louis-San Francisco Ry. Co.*, 278 U. S. 228, 233; *Arkadelphia Milling Co vs. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 145.)

Wherefore, respondent prays that the stay order be vacated and petitioners' motion dismissed; and for proper order restoring the status existing at the time the stay order was made.

Respectfully submitted,

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